SUPREME COURT, U. S.

FILED

MAR 19 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1172

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC., **Petitioners.**

v.

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, **Respondent.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WINSTON S. HOWARD,
1900 First National Bank Bldg.
Denver, Colorado 80202
266-3401

Counsel for Petitioners.

EASTWOOD PRINTING CO. • 2654 LARIMER STREET • DENVER, COLORADO

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Question Presented 2

Statutes Involved 3

Statement of the Case 4

Argument 6

Introduction 6

Point I: Defendants' activities which plaintiff claims are antitrust violations have been legislatively placed within the regulatory authority of the Secretary of Agriculture by The Packers & Stockyards Act, 1921 (7 U.S.C. §§ 181 et seq.). 7

Point II: The primary jurisdiction doctrine has been repeatedly applied to antitrust cases involving other regulated industries. 11

Point III: The Tenth Circuit decision in this case conflicts with an Eighth Circuit decision. 12

Point IV: Coordination between antitrust policies and the policies of uniform national regulation of stockyards is possible only if a court has the benefit of the administrative and regulatory expertise of the Secretary of Agriculture before evaluating the antitrust features of the defendants' activities. 17

Conclusion 18

Appendix A, Statutes Involved 20

PAGE

Appendix B, Opinion of the United States Court of Appeals, Tenth Circuit, December 23, 1968 31

TABLE OF CASES:

Aikins v. United States, 282 F.2d 53 (10th Cir. 1960) 10

Berigan v. United States, 257 F.2d 852 (8th Cir. 1958) 10

Carter v. American Telephone & Telegraph Co., 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) 11, 18, 19

Far East Conference v. United States, 342 U.S. 570 (1952) 11, 19

Farmers' Livestock Commission Co. v. United States, 54 F.2d 375 (D.C. Ill. 1931) 10

Fashion Ariginators' Guild v. F.T.C., 312 U.S. 457 (1941) 9

F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441 (1921) 9

F.T.C. v. Brown Shoe Company, Inc., 384 U.S. 316 (1966) 9

Grand Union Company v. F.T.C., 300 F.2d 92 (2nd Cir. 1962) 9

In Re Armour & Co., P. & S. Docket No. 19 (filed 1923) 8

Interstate Natural Gas Co. v. Southern California Gas Co., 209 F.2d 380 (9th Cir. 1953) 11, 19

J. M. Huber Corp. v. Denham, 367 F.2d 104 (5th Cir. 1966) 19

Keogh v. Chicago & N. W. Ry., 260 U.S. 156 (1922) 11

PAGE

McCleneghan v. Union Stockyards Co., 298 F.2d 659 (8th Cir. 1962) 6, 12, 13, 15, 16

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 11, 13, 19

S.S.W. Inc. v. American Transport Assn. of America, 191 F.2d 658 (D.C. Cir. 1951) 11, 13

Stafford v. Wallace, 258 U.S. 495 (1922) 17

Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930) 14

Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936) 11

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 11

T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) 11

United States v. Donahue Bros. Inc., 59 F.2d 1019 (C.C.A. Neb. 1932) 10, 14

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 19

United States Navigation Co. v. Cunard, 284 U.S. 474 (1932) 11

Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84 (5th Cir. 1966) 19

STATUTES:

Packers & Stockyards Act, 1921 (7 U.S.C.) (prior to 1968 Amendments) Secs. 181 et seq. 5, 7

Sec. 201 4

PAGE

Sec. 205 ..... 4, 8, 12, 13
Sec. 208 ..... 4, 7
Sec. 209 ..... 4, 10
Sec. 210 ..... 4, 7
Sec. 211 ..... 4, 7
Sec. 225 4
11 U.S.C., Sec. 47(c) 2
15 U.S.C., Sec. 1 ..... 3, 4
15 U.S.C., Sec. 2 ..... 3, 4, 13
15 U.S.C., Sec. 15 ..... 3, 4
15 U.S.C., Sec. 18 ..... 3, 4, 7, 10, 13, 15, 16
15 U.S.C., Sec. 45 ..... 8, 9, 10
28 U.S.C., Sec. 1254 2
28 U.S.C., Sec. 1292(b) 5

ATTORNEY GENERAL OPINIONS:

33 Ops. Att'y Gen. 371 (1934) 8

CONGRESSIONAL HEARING REPORTS:

Hearings Before a Subcommittee of the Senate Committee on Agriculture and Forestry on S. 1149 and H.R. 10673 to Amend the Packers and Stockyards Act, 1921, 90th Cong., 2d Sess. (1968) 17

Hearings Before the Subcommittee on Livestock and Grains of the House Committee on Agriculture on H.R. 6231 to Amend the Packers and Stockyards Act, 1921, 90th Cong., 1st Sess. (1967) 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC., **Petitioners,**

v.

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, **Respondent.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit (per Breitenstein, J.) (appended hereto) is reported at 404 F.2d 1055 (1968).

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on December 23, 1968. Jurisdiction is conferred on this Court to review the judgment

of the United States Court of Appeals, Tenth Circuit, by the following statutory provisions:

> 11 U.S.C., Sec. 47(c): "The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."
>
> 28 U.S.C., Sec. 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTION PRESENTED

This is a private antitrust action. Plaintiff, The Denver Live Stock Commission Co. (respondent), and defendant, The Denver Union Stockyard Co. (petitioner) (hereinafter "Yard Company") are both under the jurisdiction of the Secretary of Agriculture under the Packers & Stockyards Act, 1921. Defendant is accused of violating the Sherman and Clayton Acts by converting its livestock selling procedure from private treaty to auction sales, thus eliminating commission firms, such as plaintiff and other commission firms defendant had previously acquired.

Defendant contends that the doctrine of primary jurisdiction requires preliminary referral to the Secretary of the entire matter, including defendant's acquisition of commission firms, since under the Packers & Stockyards Act the Secretary has plenary control over all practices

and procedures engaged in by regulated stockyards, including mergers and acquisitions. The Act is one of the broadest of all federal regulatory enactments.

The Tenth Circuit refused to refer the matter to the Secretary, holding that (1) the Packers and Stockyards Act is not one of pervasive regulation; and (2) the Secretary has no control over mergers and acquisitions by regulated stockyards. The Eighth Circuit, however, has applied the doctrine and referred the matter to the Secretary in a similar case involving stockyards and commission firms in private antitrust litigation.

The fundamental issue involved here is whether the doctrine of primary jurisdiction, uniformly applied by this Court under other regulatory legislation, is to be applied under the Packers & Stockyards Act, which regulates the $15,000,000,000 (billion dollar) livestock industry and the $20,000,000,000 (billion dollar) meat and poultry industries. Specifically, the question presented is whether, under the doctrine of primary jurisdiction, the proceedings in this private antitrust litigation should be stayed pending referral of such matters complained of to the Secretary.

STATUTES INVOLVED

The statutory provisions which the case involves are quoted in the appendix attached hereto and are here cited as follows:

Sherman Act, § 1, 15 U.S.C. § 1

Sherman Act, § 2, 15 U.S.C. § 2

Clayton Act, § 4, 15 U.S.C. § 15

Clayton Act, § 7, 15 U.S.C. § 18

Packers & Stockyards Act, 1921, 7 U.S.C. §§ 201, 205, 208-211, 225 (in part). (Citations are to statutory sections in force prior to the 1968 Amendments.)

STATEMENT OF THE CASE

The facts material to the consideration of the question presented are as follows:

The parties will be referred to as plaintiff and defendants as they appear below. Jurisdiction in the first instance was conferred on the United States District Court in and for the District of Colorado by 15 U.S.C. § 15 (1958 Ed.). The Complaint in this action claims treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15) said to result from alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and of violation of Section 7 of the Clayton Act (15 U.S.C. § 18). The Complaint avers that certain "activities" engaged in by the defendants and "situations" created by the defendants amounted to an attempt to monopolize by the defendants, culminating in a monopoly and restraints of trade in violation of the antitrust laws. The Complaint further alleges that certain acquisitions of commission houses by the defendant Yard Company substantially lessened competition in violation of Section 7 of the Clayton Act. By these averments the plaintiff seeks compensation in damages and seeks to enjoin certain activities of the defendants in the operation of The Denver Union Stockyards.

On December 21, 1967, the defendants filed a Motion to Stay Proceedings in this case until the Secretary of Agriculture ruled whether or not the activities and situ-

ations averred by the plaintiff constitute violations of the Packers & Stockyards Act, 1921.

The grounds for the Motion to Stay Proceedings are:

(1) Defendants' activities charged by the plaintiff to be antitrust violations constitute stockyard "regulations" and "practices" whose regulation has been entrusted to the Secretary of Agriculture by the Packers & Stockyards Act, 1921, (7 U.S.C. §§ 181 et seq.).

(2) The doctrine of primary jurisdiction requires that disputes involving matters which have been entrusted to the Secretary of Agriculture for regulation under the Packers & Stockyards Act must initially be submitted to the Secretary for determination even though the plaintiff may have charged that the activities constitute antitrust violations.

Subsequent to a hearing in open court on March 29, 1968, on Defendants' Motion to Stay Proceedings, the United States District Court for the District of Colorado denied defendants' Motion. The District Court was of the opinion that the denial involved a controlling question of law as to which there may be substantial ground for difference of opinion and that, pursuant to the provisions of 28 U.S.C. § 1292(b), an immediate interlocutory appeal from that portion of the Court's Order may materially advance the ultimate termination of this litigation.

On April 16, 1968, the defendants applied to the Tenth Circuit Court of Appeals for leave to appeal from the order of the District Court. The Tenth Circuit granted the defendants' application on April 29, 1968. After oral argument on September 30, 1968, the Tenth Circuit af-

firmed the order of the District Court denying defendants' Motion to Stay the Proceedings.

ARGUMENT

Introduction

The Secretary of Agriculture, under the Packers & Stockyards Act, 1921, has been charged with the broad supervisory responsibility of stockyards' activities and practices. It is the duty of the Secretary to enforce the stockyards' obligation to furnish reasonable stockyard services and to insure that stockyards' regulations and practices are not unjust, unreasonable or discriminatory. The activities of Yard Company alleged to violate antitrust principles fall within the purview of the Secretary's regulatory authority. Under the doctrine of primary jurisdiction and the authority of *McCleneghan v. Union Stockyards Co.*, 298 F.2d 659 (8th Cir. 1962), the matters in this litigation should be referred to the Secretary before they are judicially weighed against the antitrust laws. The Tenth Circuit's rejection of the primary jurisdiction doctrine in this case conflicts directly with the *McCleneghan* holding. Application of the doctrine in this case is of prime importance, not only to the Yard Company, but to the stockyard industry generally in keeping with the established need for organized and uniform administrative regulation of the industry.

Point I

DEFENDANTS' ACTIVITIES WHICH PLAINTIFF CLAIMS ARE ANTITRUST VIOLATIONS HAVE BEEN LEGISLATIVELY PLACED WITHIN THE REGULATORY AUTHORITY OF THE SECRETARY OF AGRICULTURE BY THE PACKERS & STOCKYARDS ACT, 1921 (7 U.S.C. §§ 181 et seq.).

> "The defendants assert correctly that pen assignments, use of weigh scales, and auction sales are practices, the control of which has been relegated to the Secretary." (Tenth Circuit opinion, p. 36, app. B.)

The defendants' activities charged as Sherman Act violations have thus been held to be practices under the Packers & Stockyards Act, 1921. Under the Act, the Secretary of Agriculture has been charged with responsibility to regulate the practices of stockyards and to determine and enforce a stockyard's duty "to establish, observe and enforce just, reasonable and nondiscriminatory ... *practices* in respect to the furnishing of stockyard services ..." (7 U.S.C. § 208). (Emphasis added.) Furthermore, any person allegedly harmed by a stockyard's practices may apply to the Secretary for relief (7 U.S.C. § 210(a)), and the Secretary may award damages (7 U.S.C. § 210(e)) as well as order the stockyard to cease and desist from such violation. (7 U.S.C. § 211). Thus, the Secretary has been given full administrative control over the defendants' practices charged as Sherman Act violations.

Defendants' activities charged as Clayton 7 violations are also within the Secretary's authority over "practices". Every unjust, unreasonable or discriminatory regulation

or practice is declared to be unlawful by the Act which it is the responsibility of the Secretary to prevent or correct. The plaintiff has charged that it was injured in its business of buying and selling livestock in defendant's stockyard by defendant's acquisition of other livestock commission firms competitive to plaintiff. According to plaintiff, these acquisitions gave rise to increased use of the auction method of sale of livestock at defendant's stockyards. This culminated in the auction method being the exclusive sales method used there. Plaintiff claims injury to it because of this change of sales method. The Tenth Circuit held that auction sales are practices within the Secretary's province but refused to apply the doctrine on the ground that the Secretary has no power over acquisitions and mergers. The defendant takes the position that if its act, of whatever kind, *results* in its failure to "furnish upon reasonable request, without discrimination, reasonable stockyard services," (7 U.S.C. § 205) that act is a practice which the Secretary has a right to control.

Moreover, it has long been recognized that the Secretary of Agriculture *does* have broad powers over matters of merger and acquisitions. 33 Ops. Att'y Gen. 371 (1934). In fact, the Secretary has taken jurisdiction to initiate an inquiry into merger matters. *In Re Armour & Co.*, P. & S. Docket No. 19 (filed 1923).

The authority of the Secretary of Agriculture under the Packers & Stockyards Act, 1921, is directly analogous to the authority of the Federal Trade Commissior under the Federal Trade Commission Act, 15 U.S.C. § 45 (1958 Ed.). The FTC's responsibility covers "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce. 15 U.S.C. § 45(a)(6) (1958 Ed.).

With regard to the FTC's jurisdiction over unfair acts otherwise chargeable as Sherman Act violations, see *F.T.C. v. Brown Shoe Company, Inc.*, 384 U.S. 316, 321-22 (1966); *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 463-64 (1941); *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1921).

With regard to the FTC's jurisdiction over unfair acts otherwise chargeable as Clayton Act violations, see *F.T.C. v. Brown Shoe Company, Inc., supra; Fashion Originators' Guild v. F.T.C., supra; Grand Union Company v. F.T.C.*, 300 F.2d 92, 98-99 (2nd Cir. 1962).

The Supreme Court has said in *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 463 (1941):

> "If the purpose and practice of [the combination of defendants] runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."

Specifically with regard to the scope of the FTC's authority over "practices", the Supreme Court said in *F.T.C. v. Brown Shoe Company, Inc.*, 384 U.S. 316 at 321-22 (1966):

> "... the Commission has broad powers to declare trade practices unfair [under Federal Trade Commission Act, §5(a)(6), 15 U.S.C. §45(a)(6)]. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate such laws."

No distinction can be drawn between the FTC's statutory authority over "unfair methods of competition" and "unjust practices" of 45 U.S.C. § 45 (a) and the Secretary's statutory authority over "unjust, unreasonable or discriminatory practices" under 7 U.S.C. § 209. As the FTC's broad authority encompasses practices contrary to Clayton Act policies, so must the Secretary's authority extend to mergers and acquisitions otherwise subject to Clayton 7.

This broad scope of the Secretary's authority over "practices" is consistant with existing decisions. The practices for which the Secretary has been held responsible are widely diverse and inclusive. For instance, an agreement by agencies, dealers and order buyers furnishing stockyards services to boycott (normally viewed as an antitrust violation) was held to be a "practice" in *Farmers' Livestock Commission Co. v. United States*, 54 F.2d 375 (D.C. Ill. 1931). Similarly, practices have been held to include a determination by dealers as to which alleys bidders should be allowed in;[1] in what order bidding should be received;[2] intermingling of proceeds due livestock owners with personal funds of a market agency;[3] and a system of flipping for turns at bidding for livestock.[4] The Secretary's authority over the broad areas of unjustness, unreasonableness and discrimination must surely extend to the injury to plaintiff's business said to have arisen from Yard Company's alleged acquisitions.

---

[1]**Berigan v. United States**, 257 F.2d 852 (8th Cir. 1958).

[2]**Ibid.**

[3]**United States v. Donahue Bros., Inc.**, 59 F.2d 1019 (C.C.A. Neb. 1932).

[4]**Aikins v. United States**, 282 F.2d 53 (10th Cir. 1960).

Point II

THE PRIMARY JURISDICTION DOCTRINE HAS BEEN REPEATEDLY APPLIED TO ANTITRUST CASES INVOLVING OTHER REGULATED INDUSTRIES.

The doctrine of primary jurisdiction has been applied uniformly in private antitrust cases involving regulated industries other than the stockyards industry. The doctrine was first announced by the Supreme Court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The *Abilene* case has been repeatedly cited and relied upon in requiring preliminary submission to administrative agencies issues presented originally to courts as antitrust law violations. The doctrine has been applied in antitrust cases against firms regulated under the Interstate Commerce Act, *Terminal Warehouse Co. v. Pennsylvania R. R.*, 297 U.S. 500 (1936); see also *T. I. M. E. Inc. v. United States*, 359 U.S. 464 (1959); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); in Shipping Act antitrust cases, *Far East Conference v. United States*, 342 U. S. 570 (1952); *United States Navigation Co. v. Cunard*, 284 U. S. 474 (1932); in Civil Aeronautics Act and Federal Aviation Act antitrust cases, *Pan American World Airways, Inc. v. United States*, 371 U. S. 296 (1963); *S. S. W. Inc. v. American Transport Assn. of America*, 191 F.2d 658 (D.C. Cir. 1951); in Federal Communications Act antitrust cases, *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); and in Natural Gas Act antitrust cases, *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380 (9th Cir. 1953).

Point III

THE TENTH CIRCUIT DECISION IN THIS CASE CONFLICTS WITH AN EIGHTH CIRCUIT DECISION.

The decision by the Tenth Circuit conflicts with the decision of the Court of Appeals for the Eighth Circuit in *McCleneghan v. Union Stockyards Co.*, 298 F.2d 659 (8th Cir. 1962). *McCleneghan* held that the primary jurisdiction doctrine is properly invoked in a private antitrust action involving the stockyards industry to prevent a court from proceeding with the action until all the matters in dispute have been ruled on by the Secretary of Agriculture.

In *McCleneghan*, plaintiff, a livestock dealer, sued the stockyard company for antitrust treble damages, alleging combination and conspiracy to monpolize and restrain interstate commerce in cattle. Defendant allegedly (1) permitted a coin "flip" system to determine the priority of bids, and (2) unlawfully discriminated against the plaintiff by cancelling plaintiff's pen assignments. The "flip" system issue had previously been presented to and determined by the Secretary of Agriculture to be unlawful as being violative of the Packers & Stockyards Act. The Eighth Circuit stated that the pen assignment issue was in substance a question of whether the cancellation in itself was discriminatory by denying to plaintiff "reasonable stockyards services" as required by Section 304 of the Packer & Stockyards Act, 7 U.S.C. § 205. The Court held that pen assignments were practices involving "reasonable stockyard services" and that the primary jurisdiction doctrine had clear application.

The Court paid particular attention to the plaintiff's contention that Section 405 of the Packers & Stockyards

Act precluded application of the doctrine of primary jurisdiction. Section 405 provides in part that nothing contained in the Packers & Stockyards Act shall "prevent or interfere with the enforcement of, or the procedure under" the Sherman Act and the Clayton Act. The Court concluded that Section 405 was properly interpreted to mean that antitrust areas are not taken over exclusively by the Packers & Stockyards Act, and that the clause did not idminish the authority of the Secretary of Agriculture to determine disputes in the first instance which are within the area of his administrative capacity. (298 F.2d at 669). Thus, according to the Eighth Circuit, the saving clause of Section 405 does not nullify the doctrine of primary jurisdiction. See also *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963); *S. S. W. v. American Transport Assn. of America,* 191 F.2d 658 (D.C. Cir. 1951).

In the instant case the Tenth Circuit examined the complaint and concluded that since the plaintiff alleged violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18, and that since in its view the Packers & Stockyards Act did not provide a "pervasive scheme", the doctrine of primary jurisdiction should not apply. (See Opinion, p. 38, app. B.) The *McCleneghan* court, however, after a detailed examination of the Packers & Stockyards Act, concluded:

> "It is thus apparent that the Act [Packers & Stockyards Act] and the supplemental legislation of 1950 embrace *a comprehensive plan for the supervision of stockyards and market agencies by the Secretary,* for the issuance of appropriate orders by him in this area, and for effective enforcement of those orders." (Emphasis supplied). 298 F.2d at 664.

Earlier, the Eighth Circuit said of the Packers & Stockyards Act in *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022 (1932):

> "... The act is a very broad and comprehensive law. If we may look to the report of the congressional committee in aid of its interpretation, as was done in Tagg Bros. & Moorhead v. United States, supra, it would seem clear that those in charge of the legislation were impressed with its comprehensiveness. In the report of the House Committee on Agriculture, it is stated that this law, 'and existing laws, giving the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith; that it is a most comprehensive measure and extends further than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.'
>
> ...
>
> "Mr. Haugen, who was Chairman of the House Committee on Agriculture, speaking for his committee with reference to this bill, said:
>
> 'The secretary is to have exclusive jurisdiction over all transactions connected with the slaughtering and marketing of livestock and livestock products in interstate commerce, subject, of course, to court review; to gather and compel information concerning and to investigate the organization, conduct, practices, and management of the packers and stockyards, *including all transactions in or about the stockyards by all concerns or persons dealing on such yards.*
> ...'"
>
> (Italics in original.)

There is no basis for the Tenth Circuit's view that the Packers & Stockyards Act is not pervasive regulation.

The Tenth Circuit also refused to apply the primary jurisdiction doctrine because, it reasoned, the Secretary of Agriculture has no authority over the Clayton 7 questions. (See Opinion, p. 38, app. B.) Such reasoning seems to the defendants to be an unduly narrow interpretation of the authority of the Secretary. The plaintiff's Clayton Act allegations are directed to injury to the plaintiff due to lessened competition because of defendant's alleged acquisitions. The substance of the Clayton Act allegations is itself included within the purview of the Secretary of Agriculture's authority to proscribe stockyards' regulations and practices that are unjust, unreasonable or discriminatory, as discussed above in Point I.

Furthermore, the fact that the complaint in *McCleneghan* did not allege violations of Section 7 of the Clayton Act does not distinguish it from this case. As in *McCleneghan,* the instant complaint does allege violations of the Sherman Act, and the Sherman Act allegations are directly comparable to the Sherman Act violations alleged in *McCleneghan.* The Sherman Act and Clayton Act issues would be tried in the instant case at the same trial, and to permit the trial of the Sherman Act issues would be contrary to the holding of *McCleneghan. McCleneghan* did not purport to apply the doctrine of primary jurisdiction simply because Sherman Act violations alone were alleged. Rather, *McCleneghan* applied the doctrine of primary jurisdiction to a case involving alleged antitrust violations involving the activities of stockyards over which the Secretary of Agriculture has been granted supervisory control.

Defendants maintain that their activities giving rise to the alleged Clayton 7 charge are "practices" within the purview of the Secretary's authority. In the event, however, that the Clayton 7 issues should not be referred to the Secretary, the Tenth Circuit's decision is still squarely contrary to *McCleneghan.* In *McCleneghan,* the Eighth Circuit held that the flip system issue should *not* be submitted to the Secretary. The Secretary's views on this issue were known and thus the issue was ripe for judicial determination. Nevertheless, the doctrine of primary jurisdiction was applied for the Sherman Act issue, *i.e.* the pen assignment cancellation. That issue involved practices which, the Court held, should first be decided by the Secretary and which were thus not ripe for judicial determination under the antitrust laws.

In the instant case we have, under the Tenth Circuit decision, a similar posit of issues. One issue (Clayton 7), the Court said, should not be referred to the Secretary and is therefore ripe for judicial determination. The other issue (Sherman Act charges including pen cancellations), the Court agrees, is of the type which would be referred to the Secretary under the primary jurisdiction doctrine. Thus, the Sherman Act issue is *not* ripe for court. But the Tenth Circuit refused to refer the Sherman Act issue to the Secretary. In so holding, the Tenth Circuit decision conflicts directly with the Eighth Circuit in *McCleneghan* which did refer the Sherman Act issue despite the presence of one issue which was ripe for court action.

Point IV

COORDINATION BETWEEN ANTITRUST POLICIES AND THE POLICIES OF UNIFORM NATIONAL REGULATION OF STOCKYARDS IS POSSIBLE ONLY IF A COURT HAS THE BENEFIT OF THE ADMINISTRATIVE AND REGULATORY EXPERTISE OF THE SECRETARY OF AGSICULTURE BEFORE EVALUATING THE ANTITRUST FEATURES OF THE DEFENDANTS' ACTIVITIES.

The Congress has determined that the stockyard business is one which requires special expertise to understand and administer. It expressly confided the supervision of the stockyard business to the Secretary of Agriculture, granting him broad regulatory powers. Specifically, the issues in the instant case, regarding the Yard Company's practices and the reasonableness and justness of services provided by the Yard Company fall within the orbit of the Secretary's supervision and power.

The importance and complexity of the stockyard business and its proper coordination were recognized by the United States Supreme Court as early as *Stafford v. Wallace,* 258 U.S. 495 (1922). The need for supervision and control of the stockyard industry continues to be of prime concern to the industry, to the Secretary and to the Congress today. See *Hearings Before a Subcommittee of the Senate Committee on Agriculture and Forestry on S. 1149 and H.R. 10673 to Amend the Packers and Stockyards Act, 1921,* 90th Cong., 2d Sess. (1968); *Hearings before the Subcommittee on Livestock and Grains of the House Committee on Agriculture on H.R. 6231 to Amend the Packers and Stockyards Act, 1921,* 90th Cong., 1st Sess. (1967).

The possible confusion arising from conflicting administrative regulation and antitrust law application can only be imagined. Administrative sanction of Yard Company's practices coupled with judicial condemnation of these same practices under the antitrust laws could leave the entire industry in a quandry as to the limits of permissible conduct. There is no dispute that these possible conflicts constitute one of the critical issues in the as yet uncharted area requiring reconciliation of the antitrust laws with industry-wide administrative regulation. To defendants' knowledge, no judicial guidelines have been set forth, although the problem has been forecast. See *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

To stay the present proceedings is not to say that a favorable administrative decision would immunize stockyard defendants from antitrust action. At the very least, however, a court presiding over an antitrust action should have before it the benefit of the administrative decision based on familiarity and expertise in the area and should be aware of the Secretary's regulatory scheme. As the Court in *Carter* has emphasized, the administrative decision should be a significant factor to be considered in the antitrust litigation.

CONCLUSION

Plaintiff's antitrust action should be stayed pending referral of the matters complained of to the Secretary of Agriculture. The plaintiff should not be allowed to pursue the antitrust action in federal court until the issues involved have been submitted to the Secretary of Agriculture, and the Court should not decide the issues until such submission. Accordingly, the defendants have moved that

plaintiff's complaint be stayed pending a decision by the Secretary of Agriculture.

The relief sought by the defendant, that of having the Court action stayed, is a less drastic relief than outright dismissal. While deriving support from those authorities favoring dismissal, (*Far East Conference v. United States,* 342 U.S. 570 (1952); *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963); accord, *Interstate Natural Gas Co. v. Southern California Gas Co.,* 209 F.2d 380 (9th Cir. 1953)), the defendants request that the action merely be stayed under the authority of *United States v. Philadelphia National Bank,* 374 U. S. 321 (1963); *J. M. Huber Corp. v. Denham,* 367 F.2d 104 (5th Cir. 1966); *Weymouth v. Colorado Interstate Gas Co.,* 367 F.2d 84 (5th Cir. 1966); and *Carter v. American Telephone & Telegraph Co.,* 365 F.2d 485 (5th Cir. 1966), *cert. denied,* 388 U.S. 1008 (1967).

Defendants' Petition for a Writ of Certiorari should be granted to resolve the conflict in circuits and authorize referral of the charges to the Secretary of Agriculture.

Respectfully submitted,

WINSTON S. HOWARD,
1900 First National Bank Bldg.
Denver, Colorado 80202
266-3401

Counsel for Petitioners.

APPENDIX A

Statutes Involved

15 U.S.C., Sec. 1 (1958 Ed.); (Sherman Act, Sec. 1):

Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors,

or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C., Sec. 2 (1958 Ed.); (Sherman Act, Sec. 2):

Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C., Sec. 15 (1958 Ed.); (Clayton Act, Sec. 15):

Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C., Sec. 18 (1958 Ed.); (Clayton Act, Sec. 7):

Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all

or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Com-

munications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

7 U.S.C., Sec. 201 (1958 ed.); (Packers & Stockyards Act, 1921, Sec. 301):

STOCKYARDS AND STOCKYARD DEALERS

"Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined

When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own ac-

count or as the employee or agent of the vendor or purchaser.

7 U.S.C., Sec. 205 (1958 Ed.); (Packers & Stockyards Act, 1921, Sec. 304):

General duty as to services

It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided,* That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title.

7 U.S.C., Sec. 208 (1958 Ed.); (Packers & Stockyards Act, 1921, Sec. 307):

Unreasonable or discriminatory practices generally

It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discrim-

inatory regulation or practice is prohibited and declared to be unlawful.

7 U.S.C. Sec. 209 (1958 Ed.); (Packers & Stockyards Act, 1921, Sec. 308

Liability to individuals for violations; enforcement generally

(a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 205-207 or 208 of this title, or of any order of the Secretary made under sections 201-203 and 205-217a of this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 210 of this title, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

7 U.S.C., Sec. 210 (1958 Ed.,); (Packers & Stockyards Act, 1921, Sec. 309):

Proceedings before Secretary for violations generally; action to enforce orders

(a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 205-207 or 208 of this title, or of an order

of the Secretary made under sections 201-203 and 205-217a of this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the live-stock commissioner, board of agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subsection (a) of this section.

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201-203 and 205-217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of

such sections. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal.

If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

7 U.S.C., Sec. 211 (1958 Ed.); (Packers & Stockyards Act, 1921, Sec. 310):

Order of Secretary as to charges or practices; prescribing rates and practices generally

Whenever after full hearing upon a complaint made as provided in section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary —

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

7 U.S.C., Section 225 (in part) (1958 Ed.); Packers & Stockyards Act, 1921, Section 405 (in part):

Laws unaffected

Nothing contained in this chapter, except as otherwise provided herein, shall be construed —

(a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914; . . .

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 10,123 — NOVEMBER TERM, 1968

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC., *Appellants,*

v.

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, *Appellee.*

Appeal from the United States District Court for the District of Colorado.

[Filed December 23, 1968.]

Winston S. Howard (Dawson, Nagel, Sherman & Howard, Hugh A. Burns and George A. Sissel were with him on the brief) for Appellants.

Maurice Reuler (Mason, Reuler & Peek and Jon L. Lawritson were with him on the brief) for Appellee.

Before JONES*, BREITENSTEIN and HOLLOWAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

---

*Of the Fifth Circuit, sitting by designation.

The issue is whether the doctrine of primary jurisdiction requires the stay of a private antitrust action relating to the industry regulated by the Packers and Stockyards Act, 7 U.S.C. § 181 et seq.

The complaint as amended charges violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and of § 7 of the Clayton Act, 15 U.S.C. § 18. The trial court denied a motion to dismiss for lack of jurisdiction and certified the question for an interlocutory appeal which we denied because of a late filing. The defendants answered and moved for a stay on the ground that the action raises questions of fact and law which should first be determined by the Secretary of Agriculture under the doctrine of primary jurisdiction. The trial court denied the stay and we granted an appeal from that interlocutory order.

The doctrine of primary jurisdiction is founded on the need to resolve the procedural and substantive conflicts which arise when the authority of an administrative agency over a regulated industry impinges on the jurisdiction of the courts. In the antitrust field, it represents a method of accommodating the principle of free competition with the principle that in some economic areas regulation, restriction, or elimination of competition is required in the public interest. There is no fixed formula for the application of the doctrine.[1] The Supreme Court has upheld the invocation of the doctrine in cases arising under the Interstate Commerce Act,[2] and the Shipping Act,[3] and the Fed-

[1]United States v. Western Pacific Railroad Co., 352 U.S. 59, 64.

[2]Terminal Warehouse v. Pennsylvania Railroad Co., 297 U.S. 500, 513-515.

[3]United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd., 284 U.S. 474, 482, and Far East Conference v. United States, 342 U.S. 570, 574-576.

eral Aviation Acts.[4] The Court declined to apply the doctrine in United States v. Radio Corporation of America, 358 U.S. 334, 350, saying that the justification for primary jurisdiction disappears when there is no pervasive regulatory scheme, and no rate structures, which will be thrown out of balance by court action. In California v. Federal Power Commission, 369 U.S. 482, the Court held that the Federal Power Commission should have stayed its hand in approving the acquisition of one natural gas company by another when an antitrust suit challenging the validity of the transaction was pending in federal court. The Court said[5] that its function "is to see that the policy entrusted to the courts is not frustrated by an administrative agency." The doctrine applies where "the determination demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal or where court action will possibly interfere with or impair the coherence and uniformity of an intricate administrative program."[6]

We turn from these generalities to the case before us. We are concerned with the issues made by the pleadings. The amended complaint alleges that the plaintiff is, and for a long time has been, in business as a commission merchant engaged in sales of livestock through private treaty and auction.[7] Some of the livestock moves in interstate

---

[4]Pan American World Airways, Inc. v. United States, 371 U.S. 296, 312.

[5]369 U.S. 482, 490.

[6]World Airways, Inc. v. Northeast Airlines, Inc., 1 Cir., 349 F.2d 1007, 1010-1011. See also Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426; Great Northern Railway Company v. Merchants Elevator Company, 259 U.S. 285, 291; and Far East Conference v. United States, 342 U.S. 570, 574, 575.

[7]Under the treaty method, the stockyard function is primarily to furnish the facilities, feed, and care for the producers' livestock pending negotiations for sale. Under the auction method, livestock is consigned to the stockyard company for the purpose of sale, and prospective buyers bid at a regular public auction sale on the stock offered. Schmidt v. Old Union Stockyards Company, (Wash.) 364 P.2d 23, 24.

commerce. The defendant Yard Company has owned and operated the premises on which the business of the plaintiff, in large measure, has been conducted for many years. In 1959, the Yard Company acquired a corporation, John Clay & Company later known as The Denver Livestock Market, Inc., and as Western Stock Center, Inc., which was a commission house competing with the plaintiff. The plaintiff received livestock at the premises of the Yard Company and sold such stock primarily through private treaty. In so doing it used the pens, scales, and other facilities of the Yard Company and paid the various charges therefor. After the acquisition of John Clay & Co., the Yard Company increased the use of auction sales which previously had been held only once a year at the time of the Stock Show. On auction days all cattle had to be sold through the auction ring. On July 1, 1966, the Yard Company terminated all tenancies, required all sales to be by auction, and permitted no commission merchants, other than its subsidiaries, to sell at the yards.

We do not read the complaint as charging a contract, combination, or conspiracy violative of § 1 of the Sherman Act, 15 U.S.C. § 1. Rather it charges a violation of § 2, 15 U.S.C. § 2, by the creation, or attempted creation, of a monopoly. The allegations in this regard are that the Yard Company placed its subsidiaries in a favored position through the shifting of pen assignments, the use of weigh scales, and the institution of auction sales; that the change to auction sales from private treaty sales enabled the defendants to control and dominate the sale of livestock through the yards; that the acquisition of commission houses by the Yard Company enabled it to stifle competition; and that the July 1, 1966, action terminating the tenancy of the plaintiff and denying the right of the plaintiff and other nonsubsidiary commission merchants

to operate at the yards destroyed much of the plaintiff's business. The claim under § 7 of the Clayton Act, 15 U. S.C. § 18, is that the acquisition of other corporations and the creation of subsidiaries has "substantially lessened competition in a section of the country in the business of buying and selling livestock."

The answer of the defendants denies most of the pertinent allegations of the amended complaint and specifically denies that John Clay & Co. was acquired by any of the named defendants. It admits that "at some point in time auctions began to be held more frequently than once a year." As an affirmative defense, the defendants say that the activities complained of are within the regulatory authority of the Secretary and, hence, the action should be dismissed.

The Packers and Stockyards Act was passed in 1921 to regulate the interstate livestock business.[8] The Secretary of Agriculture determines and posts the stockyards subject to the Act. 7 U.S.C. § 202. Stockyard dealers and market agencies must be registered with the Secretary. 7 U.S.C. § 203. Both stockyard owners and market agencies must provide reasonable stockyard services without discrimination. 7 U.S.C. § 205. Rates must be reasonable, nondiscriminatory and filed with the Secretary. 7 U.S.C. §§ 206 and 207. Unreasonable or discriminatory practices are forbidden. 7 U.S.C. § 208. Individuals may collect damages for violations of the Act by complaint to the Secretary or by suit in a United States district court. 7 U.S.C. § 209. Proceedings before the Secretary and the enforcement of his orders are governed by 7 U.S.C. §§ 210-217.

---

[8]A description of the objectives of the Act and of the business regulated appears in Stafford v. Wallace, 258 U.S. 495, 512-516.

Judicial review of such orders may be had under 28 U.S.C. § 2342 with certain exceptions.

The Yard Company is a stockyard owner by determination of the Secretary and has been posted as such.[9] The plaintiff is a market agency within the scope of the Act.

In Crain v. Blue Grass Stockyards Company, 6 Cir., 399 F.2d 868, the court held that a complaint charging violations of the Sherman Act and of the Packers and Stockyards Act should not be dismissed because of the doctrine of primary jurisdiction and said, Id. at 874, that the plaintiff should not be deprived of resort to the courts "unless it clearly appears that the controversy is one that properly should be referred to the Secretary for determination." There, the plaintiff claimed that he was excluded from the defendant's stockyards without just and reasonable cause. In its answer the defendant admitted the exclusion and averred that it resulted from the violation of reasonable rules and regulations. No similar justification for exclusion appears in the case at bar. Here, the charge is that the Yard Company has monopolized the business in Denver.

The defendants assert correctly that pen assignments, use of weigh scales, and auction sales are practices, the control of which has been relegated to the Secretary. They say that this is enough to require the invocation of the doctrine of primary jurisdiction under the decision in McCleneghan v. Union Stockyards of Omaha, 8 Cir., 298 F.2d 659. In that case the complaint charged Sherman Act violations in the use of the flip system and in the cancellation of pen assignments. The court discussed primary jurisdiction at length and concluded it may be properly invoked

[9] See 7 U.S.C. § 202.

in antitrust litigation involving the Packers and Stockyards Act but it "is not an inevitable barrier to court jurisdiction in all such cases."[10] The court said that the flip system had been found to be discriminatory by the Secretary; that there was "no need for further administrative expertise on this issue"; that the problem of uniformity was not present; and that the justification for primary jurisdiction has disappeared. On the matter of pen assignments the court held that the doctrine of primary jurisdiction applied because the determination of its propriety depended, in the first instance, on whether it was a discriminatory practice which denied to the plaintiff "reasonable stockyard services" as required by 7 U.S.C. § 205.

The instant case differs from McCleneghan. We are concerned with a charge of monopolization under § 2 of the Sherman Act and of corporate acquisitions which lessened competition in violation of § 7 of the Clayton Act. There was no charge of a § 7 violation in McCleneghan. We must determine whether the doctrine of primary jurisdiction requires the stay of the issues presented by the pleadings before us.

California v. FPC[11] and Pan American Airways[12] were decided after McCleneghan. The problem of the reconciliation of these decisions has been the subject of comment.[13] As we read these decisions, the distinguishing factor lies in the pervasiveness of the regulatory statute. California v. FPC, which came first, was concerned with the Natural Gas Act which forbids the acquisition of a

---

[10]298 F.2d 659 at 667.

[11]369 U.S. 482.

[12]371 U.S. 296.

[13]See 3 Davis Admin. Law 1965 PP. § 19.06, p. 15, and Jaffe, Primary Jurisdiction, 77 Har.L.Rev. 1037, 1067-1070.

natural gas facility without FPC approval. The Court said that, as in United States v. R.C.A., 358 U.S. 334, "there is 'no pervasive scheme' * * * including the antitrust laws that has been entrusted to the Commission."[14] In Pan American Airways the Court found a pervasive scheme[15] and mentioned the immunization provision of the act then before it.[16]

Nothing in the Packers and Stockyards Act immunizes or exempts those subject to its provisions from antitrust actions. To the contrary, it provides[17] that nothing contained therein shall "prevent or interfere with the enforcement of, or the procedure under," the Sherman Act and the Clayton Act. The Secretary is given no power over acquisitions and mergers. Those regulated may abandon their activities without agency approval. In our opinion, the Act is not of the pervasive character which, when found in other acts, has resulted in the invocation of the primary jurisdiction doctrine. The determination of whether the charged antitrust violations have occurred does not require administrative expertise and court action will not impair or interfere with the coherence or uniformity of an intricate administrative program.

We believe that the pleadings present antitrust issues which call for judicial action. We repeat that the only matter before us is the question of a stay and that our decision is based on the pleadings before us. We decide nothing except that the proceedings should not be stayed.

Affirmed.

---

[14] 369 U.S. 482, 485.
[15] 371 U.S. 296, 305.
[16] 49 U.S.C. § 1384.
[17] 7 U.S.C. § 225.

SUPREME COURT, U. S.

FILED

APR 21 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1172

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC., Petitioners,

v.

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, Respondent.

RESPONDENT BRIEF AGAINST ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MASON, REULER AND PEEK,
PROFESSIONAL CORPORATION

Maurice Reuler
Jon L. Lawritson

450 Equitable Building
730 - 17th Street
Denver, Colorado 80202

Attorneys for Respondent.

INDEX

		Page
I.	SUPPLEMENTAL STATEMENT OF CASE	1
II.	QUESTION PRESENTED	2
III.	REASONS AGAINST ISSUANCE OF THE WRIT	3
IV.	CONCLUSION	8
APPENDIX A, COMPLAINT AND AMENDED COMPLAINT		10

TABLE OF CASES:

Denver Union Stockyard Co., Denver Livestock Market, Inc., and Western Stock Center, Inc., Appellants, v. Denver Live Stock Commission Co., a Colorado corporation, Appellee, (No. 10,123) . . 4

Denver Union Stockyards Co. v. Producers Livestock Association, 356 U.S. 282, 78 S.Ct. 738 (1952) 7

McCleneghan v. Union Stockyards Co., 298 F.2d 659 (8th Cir. 1962). 3,4,5,6,7,8

STATUTES:

Clayton Act, Sec. 7 1,2,6,8

INDEX - (Continued)

	Page
Rules of the Supreme Court of the United States, 1967, Part V, Jurisdiction on Writ of Certiorari; Rule 19, Considerations governing Review on Writ of Certiorari . .	2,3
15 U.S.C. Sec. 1	1
15 U.S.C. Sec. 2	1
15 U.S.C. Sec. 4	1
15 U.S.C. Sec. 18	1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1172

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC., Petitioners,

v.

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation, Respondent.

RESPONDENT BRIEF
AGAINST ISSUANCE OF WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

I. SUPPLEMENTAL STATEMENT OF CASE.

The present action is a treble damage suit brought under the Sherman and Clayton Acts (15 U.S.C. § 1, 15 U.S.C. § 2, 15 U.S.C. § 18, 15 U.S.C. § 4). The Clayton Act violation is a Section 7 violation. The thrust of the complaint is stated in two counts, the first count alleging the creation of a monopoly at the stockyards in Denver through a series

of actions culminating in the ouster of this plaintiff (respondent herein) by the defendant (petitioners herein) on or about July 1, 1966.

The second count is concerned with the acquisition and formation of subsidiaries, having the effect of lessening competition in interstate commerce, contrary to Section 7 of the Clayton Act.

The complaint and the amended complaint are attached to this brief as Appendix A. A mere reading of these documents clearly demonstrates that plaintiff has stated a case well within the doctrines of traditional antitrust litigation, calling in no manner, shape or form for the application of the doctrine of primary jurisdiction.

II. QUESTION PRESENTED.

Respondent contends that the question presented for determination by the Supreme Court at this stage of the proceeding on the petition before it, is whether petitioners have come within Rule 19 of the Rules of the Supreme Court. It is our position that the merits of the Court of Appeals decision on primary jurisdiction is not presently before the Court.

There is only one section under which petitioners can possibly seek issuance of

the writ, and that is § B, "where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter." We submit that there has been no conflict of decision between the Courts of Appeal. In addition, there is no special or important reason for the issuance of this writ, same being on an interlocutory matter.

Since the question before the Court is not the merit of the Circuit Court's opinion with respect to primary jurisdiction, but rather whether, under Rule 19, the writ should be granted at all, we will confine our answer in the present brief to a consideration of Point III of petitioners' brief, as Points I, II and IV concern the merits of the problem rather than whether the writ of certiorari should or should not be issued.

III. REASONS AGAINST ISSUANCE OF THE WRIT.

Our worthy opponents have sought the issuance of this writ upon the basis that the decision of the learned Tenth Court of Appeals in the present litigation with respect to the application of the doctrine of primary jurisdiction is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *McCleneghan v. Union Stockyards Co., 298 F.2d 659 (8th Cir. 1962)*. We submit that

the conflict, if any, rests solely in the minds of our worthy opponents. We submit that the analysis given by Judge Breitenstein with respect to the complaint on file herein is well reasoned and clearly distinguishes the *McCleneghan* case. Judge Breitenstein points out,

> The instant case differs from *McCleneghan*. We are concerned with a charge of monopolization under Section 2 of the Sherman Act and of corporate acquisitions which lessen competition in violation of Section 7 of the Clayton Act. There was no charge of a Section 7 violation in *McCleneghan*. We must determine whether the doctrine of primary jurisdiction requires the stay of issues presented by the pleadings before us. *(The Denver Union Stockyard Co., The Denver Livestock Market, Inc., and Western Stock Center, Inc., Appellants, v. The Denver Live Stock Commission Co., a Colorado corporation, Appellee, (No. 10,123.)*

The *McCleneghan* case, as the learned Tenth Court of Appeals pointed out, is clearly different from the present situation.

We note that the Eighth Circuit Court, in *McCleneghan*, sets forth the gist of the *McCleneghan* complaint to be the following:

> . . . it is apparent, we think, that the gravamen of its charge is the flip system and the pen cancellation. Stripping the complaint down to these two items, we are satisfied that on its face it then contains allegations sufficient to constitute an antitrust cause of action. *(McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659 (1962).)*

This is not the gist of our action.

The Court in *McCleneghan* further points out that although the Packers and Stockyards Act may contain a comprehensive plan, it contains two distinctive exceptions not found in other Acts with respect to antitrust jurisdiction, namely,

> Nothing contained in this chapter, except as otherwise provided herein, shall be construed --
>
> (a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of sections 1-13, 14-21, 22-27, . . . of Title 15 . . . or
>
> (b) To alter, modify, or repeal such sections or any part or parts thereof . . . (§ 405, 7 U.S.C.A.; § 225).

followed by § 308,

> . . . and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. *(McCleneghan v. Union Stock Yards Co. of Omaha, 298 F.2d 659, 664 (1962).)*

These sections, of course, refer specifically to the Sherman and Clayton Acts.

It is therefore apparent that the Court in *McCleneghan* clearly recognized that the Packers and Stockyards Act did not destroy the jurisdiction of the Court with respect to antitrust violations.

Our distinguished adversaries, in attempting to rely on *McCleneghan* as creating a conflict, seek to point out to this Honorable Court that in *McCleneghan*, because the Secretary of Agriculture had previously determined that the flip system was unlawful, there was no necessity to refer the matter again to the Secretary, but that since the question of pen assignments had not been so determined, the doctrine of primary jurisdiction should be invoked, that the Tenth Court of Appeals by not invoking the doctrine had created the conflict. (Point III, Page 12 et seq., petitioners' brief.) We

submit to this Honorable Court that the reasoning of *McCleneghan* creates no conflict whatsoever with the Tenth Circuit opinion in the present litigation. The reasoning of *McCleneghan* was that the flip system issue having been determined to be illegal, there was no reason to therefore refer it to the Secretary. This reasoning is completely apropos to the present litigation because the Supreme Court itself, in *Denver Union Stockyards Co. v. Producers Livestock Association, 356 U.S. 282, 78 S.Ct. 738 (1952)*, has already determined that no services could not be equated to reasonable services. This is the gravamen of respondent's complaint in the present litigation. What our opponents have sought to do is to pick out one paragraph of the complaint referring to the changes in pen assignments and weigh scales and thus have completely misconceived the thrust of the entire action. The thrust of the complaint is monopoly and ouster, not changes in pen assignments and weigh scales. It is as if one would seek to ban a book because in someone's mind a paragraph was pornographic and thus the entire book should be banned. *McCleneghan* states that with respect to pen cancellations, this is a practice which is the gravamen of the complaint. In the complaint presently before the Court, a reading clearly points out that such is not the case. Monopoly and ouster is the gravamen in the Sherman Act

violation. No technical expertise or uniformity is required, thus primary jurisdiction has no application. Neither a book nor a complaint is to be judged by one paragraph. It is the overall story that determines the matter.

Lastly, we would submit that an analysis of the *McCleneghan* opinion supports the decision of Judge Breitenstein in refusing to invoke the doctrine of primary jurisdiction, not only on the ground previously discussed, but on the ground that is apparently inferentially conceded by our opponents with respect to the Section 7 violation (page 15 of petitioners' brief) so that the truth of the matter is that there is no conflict between the two Circuits, thus no reason to issue the writ of certiorari.

IV. CONCLUSION.

In conclusion, respondent plaintiff respectfully submits that the application for writ of certiorari should be denied for the following reasons:

A. There are no special or important reasons for the issuance of the writ at this stage of the litigation.

B. There is no conflict in the decisions of the Tenth Court of Appeals and the Eighth Court of Appeals.

Therefore, this writ should be denied and the matter remanded to the United States District Court for the District of Colorado for appropriate proceedings, bringing the litigation to trial.

Respectfully submitted,

MASON, REULER AND PEEK,
PROFESSIONAL CORPORATION

Maurice Reuler
Jon L. Lawritson

Attorneys for Respondent
450 Equitable Building
730 - 17th Street
Denver, Colorado 80202

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. _____

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation,

Plaintiff,

vs.

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC. and WESTERN STOCK CENTER, INC.,

Defendants.

COMPLAINT FOR DAMAGES
(Jury Demanded)

COMES NOW the Plaintiff above named through its attorneys, Mason, Reuler and Peek, and for claim for relief against these Defendants, alleges:

I.

JURISDICTION AND VENUE

1. The present action is brought pursuant to the laws and statutes of the United States of America against these

Defendants under Section 15 of Title 15, U.S.C.A., being a part of the Act of Congress of July 2, 1890, ch. 649, 26 Statutes 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act and the Clayton Act.

II.

SPECIFIC SECTIONS OF STATUTES INVOLVED

1. Sherman Act violations: Title 15, Section 1, U.S.C.A.

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

Title 15, Section 2, U.S.C.A. provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $50,000.00, or by

imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

2. Clayton Act violations: Title 15, Section 18, U.S.C.A.

"No corporation engaged in commerce shall acquire directly or indirectly the whole or any part of the stock or any other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."

3. Title 15, Section 4, U.S.C.A.

"Several District Courts in the United States are invested with jurisdiction to prevent and restrain violations of Sections 1 through 7 of this title through . . ."

III.

DESCRIPTION OF PARTIES

1. The Plaintiff is presently engaged, and has been so engaged since 1887, in business at The Denver Union

Stockyards, acting as a commission merchant through private treaty and auction in the sale of cattle and hogs and sheep. The Plaintiff in this connection has received for sale cattle and hogs and sheep in the several states surrounding Colorado, all of which have been shipped in to the Plaintiff at The Denver Union Stockyard Co. yards where Plaintiff maintained its offices and transacted a large share of its business.

2. The Defendant, The Denver Union Stockyard Co., is the owner and has operated, either itself or through its predecessors, the premises upon which the business of the Plaintiff has been, in large measure, conducted for many years. In this connection, these premises, owned by said Defendant, are located in the City and County of Denver, in what is commonly known as "the Stockyards district." The premises consist of a main building in which the offices of the Plaintiff, as well as the Defendant, are located, and adjacent yards for the feeding, handling and processing of cattle and other livestock prior to sale to various meat packers and others using such products.

3. The Defendant, The Denver Livestock Market, Inc., is a corporation, the name of which was originally John Clay & Co. of Denver, Colorado, which company, prior to its purchase by the Defendant,

The Denver Union Stockyard Co., was a commission house competing with the Plaintiff.

4. The Defendant, Western Stock Center, Inc., is a successor corporation to The Denver Livestock Market, Inc., the name of same having been changed to Western Stock Center, Inc.

IV.

NATURE OF THE TRADE AND COMMERCE

1. The Plaintiff has been in the livestock business since 1887. During all this time Plaintiff has maintained its offices at the Livestock Exchange Building, owned by the Defendant, The Denver Union Stockyard Co.

2. The nature of the Plaintiff's business consisted primarily of the sale of livestock for many, many years, solely through private treaty. Private treaty was the independent sale of livestock to a purchaser through private agreement between the commission merchant and the purchaser of the stock.

3. Plaintiff received the livestock through shipment to it from various suppliers located in the several states surrounding Colorado, as well as suppliers within the State, who shipped the livestock via rail or truck to the office

of the Plaintiff at the yards of the Defendant, The Denver Union Stockyard Co.

4. The Plaintiff, for the use of the yards of the said Defendant, paid unto Defendant various charges as set by Defendant. In return therefor, Plaintiff used the pens and other facilities of Defendant, including weigh scales and other like items.

5. The Defendant, The Denver Union Stockyard Co., upon its acquisition of John Clay & Co. of Denver, Colorado, which subsequently became the other Defendants herein, began to change the nature of the operation at the stockyards through the institution of auction sales.

6. Prior to Defendant's acquisition of John Clay & Co. of Denver, Colorado, auction sales had been held only once a year, usually at the time of the Stock Show. Subsequent to the acquisition of John Clay & Co., auctions began to be held more and more frequently, increasing to as much as two and three times per week.

7. During auction days, the Defendant required that no cattle be sold except through the auction ring, thus requiring Plaintiff to sell any cattle consigned to it through the auction ring on those days.

8. That the marketing of livestock in Denver, Denver being one of the major centers in the country, is a unique business affected with the public interest, and the Defendant, The Denver Union Stockyard Co. is in effect a public utility.

9. That for many years the customers of the Plaintiff have shipped their cattle to Plaintiff at The Denver Union Stockyards, and that same, namely said yards, is the best and most usual place in which to sell said livestock.

V.

SHERMAN ACT VIOLATIONS
THE COMBINATION OR UNLAWFUL CONTRACT
IN RESTRAINT OF TRADE

1. Commencing with the acquisition of the two other Defendants, formerly known as John Clay & Co. of Denver, Colorado, in 1959, the Defendant, The Denver Union Stockyard Co., changed its long time position from landlord to that of landlord and competitor of Plaintiff.

2. That by reason of the fact that the Defendant, The Denver Union Stockyard Co., was also the owner of the stockyards and all its facilities, said Defendant placed its subsidiary Defendants in a favored position as against all other commission houses trading in the area.

3. That this favored position was obtained through divers means including the shifting of pen assignments for livestock, the use of weigh scales and the institution of increasing auctions, preventing the Plaintiff and others from engaging in private treaty sale of livestock.

4. That between March 1, 1959 and July 1, 1966, the Defendants, by various and divers means unknown to the Plaintiff, acquired several other of the competing commission houses, the effect of which was to reduce competition and to give the Defendants greater and greater control over the sales taking place at the stockyards.

5. That the increasing use of the auction sale rather than the private treaty sale enabled the Defendants to control and dominate the sale of livestock through the stockyards.

6. That the acquisition of the various commission houses by the Defendants permitted the Defendants to increasingly stifle competition at the stockyards, giving the Defendants increasing control of all facilities and customers who shipped livestock to the stockyards.

7. That the attempt to monopolize by the Defendants culminated in a monopoly on or about July 1, 1966, when the

Defendant, The Denver Union Stockyard Co., announced that henceforth no other commission merchants would be permitted to operate at the stockyards, that all tenancies would be terminated, and that only its subsidiaries, the other Defendants, would be permitted to sell at the yards.

8. That this ukase by the Defendants created a monopoly and destroyed competition by forcing the Plaintiff to completely change its operations, inter alia by preventing Plaintiff from receiving further shipments of cattle at the yards, and thus destroying much of Plaintiff's business.

9. That the Defendants also restrained the trade of the Plaintiff through the pirating of a valued employee of the Plaintiff by informing said employee that the Plaintiff would soon be out of business.

VI.

CLAYTON ACT VIOLATIONS

1. That the Defendants and all of them are alter egos of each other.

2. That the Defendant, The Denver Union Stockyard Co., when it purchased John Clay & Co. of Denver, Colorado, formed a corporation resulting in the

formation of the other corporate Defendants, substantially lessened competition.

3. That the acquisition of the other commission houses by the Defendants, either through acquisition of their assets or stocks, substantially lessened competition.

VII.

DAMAGE TO PLAINTIFF

1. That the actions of the Defendants amount to a combination in restraint of trade or commerce affecting the business of the Plaintiff throughout the several states with reference to purchase and sale of livestock.

2. That these acts with respect to the Plaintiff and the public at large have had and will continue to have a direct and substantial effect on interstate commerce, and have had and will continue to cause unto the Plaintiff substantial damages as hereinafter set forth:

(a) That between May 31, 1960 and May 31, 1966, the business done by the Plaintiff at the Defendant's yards decreased from 77% to 44%, a net decrease of 33%. That this decrease was caused by the acts of the Defendants heretofore enumerated and

have damaged the Plaintiff in the amount of $61,200.74.

(b) That from and after July 1, 1966, the Defendants have damaged and will continue to damage the Plaintiff by reason of the fact that Plaintiff can no longer continue its business as heretofore because of the wrongful acts of the Defendants in completely barring Plaintiff from the use of any of its facilities. That the gross profits expected to be realized by the Plaintiff from its operations at The Denver Union Stockyard for the year ending May 31, 1966 were $19,021.37 and that the loss of said profits for a reasonable period, not to exceed six years, would be $114,128.10, all to Plaintiff's damage in said amount.

(c) That the Plaintiff has suffered general damage by reason of loss of good will caused by the Defendant with the destruction of its primary place of business and consequent loss of the use of the livestock yards in the amount of $100,000.00.

WHEREFORE, Plaintiff prays:

1. That Summons issue to each of the Defendants commanding them to answer the allegations contained in this Complaint,

and to abide by and perform the orders and decrees of this Court as same may be made in the premises.

2. That the Defendants be required to reopen their facilities for the use of the Plaintiff and other like commission merchants who may apply for use, since Defendant is a public utility.

3. That the Plaintiff receive, on its claim for damage for its own account, the following:

$61,200.74 under count (a), said sum to be trebled to $183,602.22.

4. That the Plaintiff receive, on its claim for damage for its own account, the following:

$114,128.10 under count (b), said sum to be trebled to $342,384.30.

5. That the Plaintiff receive as general compensatory damages, for loss of good will, the sum of $100,000.00.

6. That the Plaintiff be awarded reasonable attorney fees as provided by law, together with the cost of this action.

7. That the Defendants be restrained and enjoined since Plaintiff will continue to be injured in the manners herein

complained of and therefore has no plain, speedy or adequate remedy at law.

8. That the Plaintiff have such other, further and different relief as to this Court appears just and equitable in the premises.

MASON, REULER AND PEEK

By H. Shields Mason

By Maurice Reuler

Attorneys for Plaintiff
450 Equitable Building
Denver, Colorado 80202
222-5891

Address of Plaintiff:
c/o 450 Equitable Building
Denver, Colorado

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 66-C-434

THE DENVER LIVE STOCK COMMISSION CO., a Colorado corporation,

Plaintiff,

vs.

THE DENVER UNION STOCKYARD CO., THE DENVER LIVESTOCK MARKET, INC., and WESTERN STOCK CENTER, INC.,

Defendants.

AMENDMENT TO SECTION VI
OF PLAINTIFF'S COMPLAINT

COMES NOW the Plaintiff above named, through its attorneys, MASON, REULER AND PEEK, and as an amendment to Section VI of the Plaintiff's Complaint, alleges:

SECTION VI

CLAYTON ACT VIOLATIONS

1. That Defendant The Denver Union Stockyard Company is a corporation doing business in Colorado.

2. That Defendant The Denver Union Stockyard Company is a corporation engaged in interstate commerce.

3. That Defendant The Denver Union Stockyard Company acquired the assets of Lowell Commission Company and other corporations best known to Defendant.

4. That Lowell Commission Company, and possibly other corporations best known to Defendant, were, at the time of these acquisitions, corporations engaged in interstate commerce.

5. That the effect of these acquisitions was to lessen competition between other commission merchants engaged in the business of buying and selling livestock in a section of the country.

CLAIM B

1. That in addition to the violation stated above, the Defendant The Denver Union Stockyard Company formed a number of subsidiaries -- The Denver Livestock Market, Inc. and Western Stock Center, Inc., among others.

2. That by forming said subsidiaries, the Defendant The Denver Union Stockyard Company acquired the stock and assets of said subsidiaries.

3. That the effect of the formation and acquisitions of said subsidiaries substantially lessened competition in a section of the country in the business of buying and selling livestock.

CONCLUSION

1. That the Plaintiff has been injured by the violations of the Defendants referred to above, and have been damaged to the extent shown in Section VII of this Complaint.

2. That the injuries suffered by Plaintiff were the result of Defendants' violation of the anti-trust laws, entitling plaintiff to treble damages, pursuant to 15 U. S. C., Section 15.

3. That the Plaintiff prays for the relief requested in the main body of the Complaint.

MASON, REULER AND PEEK

By Maurice Reuler

By Chester H. Walter, Jr.

Attorneys for Plaintiff
450 Equitable Building
Denver, Colorado 80202
222-5891